Legis. Prog. February 7, 2018

First Supplement to Memorandum 2018-4

2018 Legislative Program (Status Report)

This supplement presents two recent developments regarding the Commission's 2018 legislative program.

REVOCABLE TRANSFER ON DEATH DEED

Assembly Bill 1739 (Chau) would implement the Commission's recommendation on *Revocable Transfer on Death Deed: Recordation* (April 2017),¹ as an urgency measure.

That bill would expressly provide that recordation of the FAQ page of the statutory RTODD form is not required. It would make that rule retroactive, applying to all RTODDs, regardless of when they were executed.

The California Land Title Association ("CLTA") is opposed to AB 1739. Their letter explaining their position is attached at Exhibit pages 1-2. They have two concerns about the bill. They are discussed below.

Opposition to Retroactive Application

CLTA believes that retroactive application of the rule in AB 1739 would be problematic because it would not provide reliable evidence of the validity of an RTODD that was recorded without the FAQ.²

Retroactive statutes are subject to challenge on due process grounds. This means that the validity of an RTODD that was recorded without the FAQ could perhaps be challenged on constitutional grounds, despite the application of the "saving" rule in AB 1739. If there is a risk of constitutional challenge, then it could be difficult or impossible for a beneficiary of an RTODD to obtain title

^{1.} Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

^{2.} See Exhibit p. 1.

insurance. This would defeat one of the goals of the proposed law, to provide sufficient certainty of validity to make it possible to insure title conveyed by RTODD, despite a failure to record the FAQ.

While there is not enough time to exhaustively consider this issue before the Commission's February 8 meeting, the staff does see one situation in which retroactive application might be challenged on due process grounds.

If the rule in AB 1739 were applied retroactively to an RTODD that *had already* operated, because the transferor died before AB 1739 took effect, vested property rights could perhaps be disturbed. For example:

Transferor executes and records an RTODD, without recording the FAQ. The RTODD names the transferor's friend as sole beneficiary. Transferor dies before AB 1739 operates.

The validity of the RTODD is challenged for failure to record the FAQ. A court finds the deed invalid and the property subject to probate. Under the rules of intestate succession, the property is transferred to the decedent's children (rather than the decedent's friend).

AB 1739 then operates, retroactively affirming the validity of the RTODD. The decedent's friend claims the property pursuant to the RTODD. The children challenge the retroactive application of the statute on the grounds that its operation would deprive them of a vested property right.

The staff sees two ways in which that situation might be avoided:

- (1) Provide that the statute applies to all RTODDs, whenever executed, except for RTODDs executed by a transferor who died before the effective date of AB 1739. This would avoid the scenario described above, while still allowing retroactive application of the statute to RTODDs that were executed before the effective date of AB 1739 but have not yet operated. RTODDs that have not yet operated do not create any vested property rights.³
- (2) Make the statute entirely prospective.

Value of FAQ in Preventing Fraud

CLTA believes that recordation of the FAQ serves as "a safeguard against elder abuse" which is "critical in ensuring that the person executing an RTODD

^{3.} See Prob. Code § 5650(b) ("During the transferor's life, execution and recordation of a revacable transfer on death deed: ... (b) Does not create any legal or equitable right in the beneficiary....").

is fully informed of what the execution of such an instrument means and ultimately entails."⁴

This issue was considered by the Commission in its prior deliberations.

MEDIATION CONFIDENTIALITY

Senator Wieckowski has introduced a bill on mediation confidentiality (Senate Bill 954) that takes a different approach to the issue than was recommended by the Commission. A copy of the bill is attached as Exhibit pp. 3-4.

Respectfully submitted,

Brian Hebert Executive Director

^{4.} See Exhibit p. 2.



February 6, 2018

The Honorable Ed Chau Member, California State Assembly State Capitol, Room 5016 Sacramento, CA 95814

RE: AB 1739 (CHAU) – OPPOSE (as introduced January 3, 2018)

Dear Assembly Member Chau:

On behalf of the California Land Title Association, which has represented the title insurance industry in California since 1907, we regret to inform you of our "Oppose" position on AB 1739. *This bill is* scheduled to be heard before the Assembly Judiciary Committee on February 13, 2018.

CLTA is on the record having held long-standing concerns regarding the creation of revocable transfer upon death deeds (RTODDs) as a "single" device to transfer real property, with our chief concerns being the deeds' potential for fraud and unintended misuse. The legislation proposed within AB 1739, which seeks to retroactively validate RTODDs, further muddles the waters with regard to these instruments and poses serious risks for those individuals who have used, and will seek to use, RTODDs moving forward.

Finding RTODDs Valid Retroactively Carries Substantial Risks:

As an industry, our members have seen a disproportionately large number of the RTODDs executed improperly, creating clouds on the title of real property and resulting in deeds that cannot be relied upon by subsequent buyers and lenders. Even when attorneys were involved, many RTODDs were executed improperly and in conflict with a strict interpretation of the law.

An improperly executed and recorded RTODD results in the RTODD being considered unreliable as a document for transferring real property. Any grantee relying on a RTODD that was improperly executed and recorded will often find that they cannot transfer, refinance, or sell the granted real property until the real property is probated.

While we understand the allure of allowing improperly-recorded RTODDs (such as those without FAQs) to be considered valid retroactively, we believe that such an approach would be a very bad idea. Either the RTODDs were executed properly with the FAQs, or they were not. Attempting to retroactively legitimize RTODDs by statute would not have any bearing on their reliability as a document for transferring real property, and would undoubtedly have many other unintended effects as well. Retroactive application of law is always dangerous and subject to constitutional challenge, adding yet another layer of complication to a law that is not working well as it is.

Requiring Recordation of FAQs is a Valuable Safeguard Against Elder Abuse:

Furthermore, CLTA views the FAQ component of RTODDs as a safeguard against elder abuse. By removing the recordation requirement of the FAQ section of the form, we believe that AB 1739 removes a component that is critical in ensuring that the person executing an RTODD is fully informed of what the execution of such an instrument means and ultimately entails.

For the aforementioned reasons, CLTA is "OPPOSED" to AB 1739.

Respectfully,

Craig C. Page

Executive Vice President

and Counsel

California Land Title Association

cc: Members, Assembly Judiciary Committee

Matt Cremins, Office of Assemblymember Chau Leora Gershenzon, Assembly Judiciary Committee

Lexi Howard, California Advocates, Inc. John Caldwell, Public Policy Advocates

Introduced by Senator Wieckowski

January 30, 2018

An act to add Section 1129 to the Evidence Code, relating to mediation.

LEGISLATIVE COUNSEL'S DIGEST

SB 954, as introduced, Wieckowski. Mediation: confidentiality.

Under existing law, if a person consults a mediator or consulting service for the purpose of retaining mediation services, or if persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute, anything said in the course of a consultation for mediation services or in the course of the mediation is not admissible in evidence nor subject to discovery, and all communications, negotiations, and settlement discussions by and between participants or mediators are confidential, except as specified.

This bill would require an attorney representing a person participating in a mediation or a mediation consultation to inform his or her client of the confidentiality restrictions related to mediation, as specified, and to obtain informed written consent from the client that he or she understands the restrictions before the client participates in the mediation or mediation consultation.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1129 is added to the Evidence Code, to 2 read:

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SB 954 -2-

1 1129. Before engaging in a mediation or a mediation 2 consultation, an attorney representing a client participating in the 3 mediation or a mediation consultation shall inform his or her client 4 of the confidentiality restrictions as described in Section 1119, and 5 obtain the client's written consent to the restrictions, in a form 6 acknowledging that the client is informed of the restrictions and 7 understands them.

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